Senate Bill No. 1436

CHAPTER 843

An act to add Chapter 32 (commencing with Section 22947) to Division 8 of the Business and Professions Code, relating to business.

[Approved by Governor September 28, 2004. Filed with Secretary of State September 28, 2004.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1436, Murray. Computer spyware.

Existing law provides for the regulation of various businesses by the Department of Consumer Affairs. No existing law provides for the regulation of computer spyware.

This bill would prohibit a person or entity other than the authorized user of a computer owned by a person in California from, with actual knowledge, conscious avoidance of actual knowledge, or willfully, causing computer software to be copied onto the computer and using the software to (1) take control of the computer, as specified, (2) modify certain settings relating to the computer's access to or use of the Internet, as specified, (3) collect, through intentionally deceptive means, personally identifiable information, as defined, (4) prevent, without authorization, an authorized user's reasonable efforts to block the installation of or disable software, as specified, (5) intentionally misrepresent that the software will be uninstalled or disabled by an authorized user's action, or (6) through intentionally deceptive means, remove, disable, or render inoperative security, antispyware, or antivirus software installed on the computer. The bill would also prohibit a person or entity who is not an authorized user from inducing an authorized user to install a software component by intentionally misrepresenting that it is necessary for security or privacy or in order to open, view, or play a particular type of content. The bill would prohibit a person or entity who is not an authorized user from deceptively causing the copying and execution on the computer of software components with the intent of causing an authorized user to use the components in a way that violates any of these prohibitions.

The bill would provide that if any part of these provisions or their applications are held invalid, the invalidity would not affect other provisions.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature that this act protect California consumers from the use of spyware and malware that is deceptively or surreptitiously installed on their computers. Because the threats posed by these practices change over time, it is the intent of the Legislature to revise the provisions in this act as needed to fully protect consumers from additional unfair and deceptive practices and to address future innovations in computer technology and practices.

SEC. 2. Chapter 32 (commencing with Section 22947) is added to Division 8 of the Business and Professions Code, to read:

CHAPTER 32. CONSUMER PROTECTION AGAINST COMPUTER SPYWARE ACT

22947. This chapter shall be known as and may be cited as the Consumer Protection Against Computer Spyware Act.

22947.1. For purposes of this chapter, the following terms have the following meanings:

(a) ''Advertisement'' means a communication, the primary purpose of which is the commercial promotion of a commercial product or service, including content on an Internet Web site operated for a commercial purpose.

(b) ''Authorized user,'' with respect to a computer, means a person who owns or is authorized by the owner or lessee to use the computer. An ''authorized user'' does not include a person or entity that has obtained authorization to use the computer solely through the use of an end user license agreement.

(c) ''Computer software'' means a sequence of instructions written in any programming language that is executed on a computer.

(d) ''Computer virus'' means a computer program or other set of instructions that is designed to degrade the performance of or disable a computer or computer network and is designed to have the ability to replicate itself on other computers or computer networks without the authorization of the owners of those computers or computer networks.

(e) ''Consumer'' means an individual who resides in this state and who uses the computer in question primarily for personal, family, or household purposes.

(f) ''Damage'' means any significant impairment to the integrity or availability of data, software, a system, or information.

(g) ''Execute,'' when used with respect to computer software, means the performance of the functions or the carrying out of the instructions of the computer software.

(h) ‘‘Intentionally deceptive’’ means any of the following:

(1) By means of an intentionally and materially false or fraudulent statement.

(2) By means of a statement or description that intentionally omits or misrepresents material information in order to deceive the consumer.

(3) By means of an intentional and material failure to provide any notice to an authorized user regarding the download or installation of software in order to deceive the consumer.

(i) ‘‘Internet’’ means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol (IP), or its subsequent extensions, and that is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, or its subsequent extensions, or other IP-compatible protocols, and that provides, uses, or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described in this subdivision.

(j) ‘‘Person’’ means any individual, partnership, corporation, limited liability company, or other organization, or any combination thereof.

(k) ‘‘Personally identifiable information’’ means any of the following:

(1) First name or first initial in combination with last name.

(2) Credit or debit card numbers or other financial account numbers.

(3) A password or personal identification number required to access an identified financial account.

(4) Social Security number.

(5) Any of the following information in a form that personally identifies an authorized user:

(A) Account balances.

(B) Overdraft history.

(C) Payment history.

(D) A history of Web sites visited.

(E) Home address.

(F) Work address.

(G) A record of a purchase or purchases.

22947.2. A person or entity that is not an authorized user, as defined in Section 22947.1, shall not, with actual knowledge, with conscious avoidance of actual knowledge, or willfully, cause computer software to be copied onto the computer of a consumer in this state and use the software to do any of the following:

(a) Modify, through intentionally deceptive means, any of the following settings related to the computer’s access to, or use of, the Internet:

(1) The page that appears when an authorized user launches an Internet browser or similar software program used to access and navigate the Internet.

(2) The default provider or Web proxy the authorized user uses to access or search the Internet.

(3) The authorized user's list of bookmarks used to access Web pages.

(b) Collect, through intentionally deceptive means, personally identifiable information that meets any of the following criteria:

(1) It is collected through the use of a keystroke-logging function that records all keystrokes made by an authorized user who uses the computer and transfers that information from the computer to another person.

(2) It includes all or substantially all of the Web sites visited by an authorized user, other than Web sites of the provider of the software, if the computer software was installed in a manner designed to conceal from all authorized users of the computer the fact that the software is being installed.

(3) It is a data element described in paragraph (2), (3), or (4) of subdivision (k) of Section 22947.1, or in subparagraph (A) or (B) of paragraph (5) of subdivision (k) of Section 22947.1, that is extracted from the consumer's computer hard drive for a purpose wholly unrelated to any of the purposes of the software or service described to an authorized user.

(c) Prevent, without the authorization of an authorized user, through intentionally deceptive means, an authorized user's reasonable efforts to block the installation of, or to disable, software, by causing software that the authorized user has properly removed or disabled to automatically reinstall or reactivate on the computer without the authorization of an authorized user.

(d) Intentionally misrepresent that software will be uninstalled or disabled by an authorized user's action, with knowledge that the software will not be so uninstalled or disabled.

(e) Through intentionally deceptive means, remove, disable, or render inoperative security, antispyware, or antivirus software installed on the computer.

22947.3. A person or entity that is not an authorized user, as defined in Section 22947.1, shall not, with actual knowledge, with conscious avoidance of actual knowledge, or willfully, cause computer software to be copied onto the computer of a consumer in this state and use the software to do any of the following:

(a) Take control of the consumer's computer by doing any of the following:

(1) Transmitting or relaying commercial electronic mail or a computer virus from the consumer's computer, where the transmission

or relaying is initiated by a person other than the authorized user and without the authorization of an authorized user.

(2) Accessing or using the consumer's modem or Internet service for the purpose of causing damage to the consumer's computer or of causing an authorized user to incur financial charges for a service that is not authorized by an authorized user.

(3) Using the consumer's computer as part of an activity performed by a group of computers for the purpose of causing damage to another computer, including, but not limited to, launching a denial of service attack.

(4) Opening multiple, sequential, stand-alone advertisements in the consumer's Internet browser without the authorization of an authorized user and with knowledge that a reasonable computer user cannot close the advertisements without turning off the computer or closing the consumer's Internet browser.

(b) Modify any of the following settings related to the computer's access to, or use of, the Internet:

(1) An authorized user's security or other settings that protect information about the authorized user for the purpose of stealing personal information of an authorized user.

(2) The security settings of the computer for the purpose of causing damage to one or more computers.

(c) Prevent, without the authorization of an authorized user, an authorized user's reasonable efforts to block the installation of, or to disable, software, by doing any of the following:

(1) Presenting the authorized user with an option to decline installation of software with knowledge that, when the option is selected by the authorized user, the installation nevertheless proceeds.

(2) Falsely representing that software has been disabled.

(d) Nothing in this section shall apply to any monitoring of, or interaction with, a subscriber's Internet or other network connection or service, or a protected computer, by a telecommunications carrier, cable operator, computer hardware or software provider, or provider of information service or interactive computer service for network or computer security purposes, diagnostics, technical support, repair, authorized updates of software or system firmware, authorized remote system management, or detection or prevention of the unauthorized use of or fraudulent or other illegal activities in connection with a network, service, or computer software, including scanning for and removing software proscribed under this chapter.

22947.4. (a) A person or entity, who is not an authorized user, as defined in Section 22947.1, shall not do any of the following with regard to the computer of a consumer in this state:

(1) Induce an authorized user to install a software component onto the computer by intentionally misrepresenting that installing software is necessary for security or privacy reasons or in order to open, view, or play a particular type of content.

(2) Deceptively causing the copying and execution on the computer of a computer software component with the intent of causing an authorized user to use the component in a way that violates any other provision of this section.

(b) Nothing in this section shall apply to any monitoring of, or interaction with, a subscriber's Internet or other network connection or service, or a protected computer, by a telecommunications carrier, cable operator, computer hardware or software provider, or provider of information service or interactive computer service for network or computer security purposes, diagnostics, technical support, repair, authorized updates of software or system firmware, authorized remote system management, or detection or prevention of the unauthorized use of or fraudulent or other illegal activities in connection with a network, service, or computer software, including scanning for and removing software proscribed under this chapter.

22947.5. It is the intent of the Legislature that this chapter is a matter of statewide concern. This chapter supersedes and preempts all rules, regulations, codes, ordinances, and other laws adopted by a city, county, city and county, municipality, or local agency regarding spyware and notices to consumers from computer software providers regarding information collection.

22947.6. The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

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